(2002) 07 OHC CK 0031

In the Orissa High Court

Case No : O.J.C. No. 930 of 1998

OCL India Ltd. and Another — APPELLANT

Vs

The State of Orissa and Others — RESPONDENT

Date of Decision : 22-07-2002

Acts Referred:

- Central Sales Tax (Orissa) Rules, 1957 — Rule 22
- Constitution of India, 1950 — Article 226
- Orissa Sales Tax Act, 1947 — Section 12, 16(1), 17, 23, 23(4)
- Orissa Sales Tax Rules, 1947 — Rule 3, 3(2), 3(3), 49(1), 79

Citation : (2002) 07 OHC CK 0031

Hon'ble Judges : P.K. Balasubramanyan, C.J;A.S. Naidu, J

Bench : Division Bench

Advocate : Ashok Kumar Parija, B.C. Mohanty, P.P. Mohanty and S.P. Sarangi, for the Appellant; Standing Counsel (Commercial Taxes), for the Respondent

Final Decision : Dismissed

Judgement

P.K. Balasubramanyan, C.J.—This writ petition is filed by an Assesses under the Orissa Sales Tax Act, 1947 (hereinafter referred to as the ''Act''). The Assessee challenges the notice Annexure-8 issued to it under Rule 80 of the Orissa Sales tax ~Rules, 1947 (hereinafter referred to as the ''Rules'') read with Rule 22 of the Central Sales Tax (Orissa) Rules. By that notice, the Assessee was called upon to produce its books of accounts and all relevant documents and records in respect of the transactions of the Assessee for the assessment year 1986-87 under the Central Sales Tax Act, and in respect of the claim of the Assessee relating to stock transfer, during the relevant year and to show cause why its claim of stock transfer should not be disallowed and the transactions treated as sales in the course of inter-State trade and commerce. The allegations in the writ Petitioner do not show that the Assessee had filed a reply to this notice. The Assessee has approached this Court invoking the jurisdiction of this Court under Article 226 of the Constitution of India challenging the legality and validity of the notice and also questioning the Constitutional validity of Rule 80 of the Orissa

Sales Tax Rules. At the hearing, the Constitutional validity of Rule 80 of the Rules was not seriously pursued. But, the jurisdiction of the Commissioner of Commercial Taxes to issue such a notice was seriously questioned on the basis of a challenge to the legality of the notice in the circumstances of the case.

2. The Assessee is an existing company under the Companies Act, 1956 engaged in the business of manufacture of cement and refractory products and having its registered office and factory at Rajgangpur in the district of Sundargarh in this State. It is a registered dealer under the-Orissa Sales Tax Act and also under the Central Sales Tax Act. The Assessee, in the course of its business of manufacture and sale of cement, had opened a branch at Calcutta and according to it, had appointed a number of consignment agents in the States of West Bengal and Bihar. Sales inside the State of Orissa were made on ex-works basis. According to the Assessee whenever any consumer located outside the State of Orissa placed orders directly on the company, the deliveries were effected by the Assessee and the relevant sale transactions were completed on inter-State sales basis. According to the assessee it was also making stock transfers of sizeable quantities of cement from time to time on a routine basis to its branch and consignment agents so that sufficient stock was available at all times at the Branch and the locations of the consignment agents with a view to be in a position to meet the open market demand for the product. The Assessee used to despatch cement to its Calcutta Branch and various consignment agents at frequent intervals depending upon the availability of railway wagons. According to the Assessee, the cement is moved as the goods of the Assessee to the consignees. The goods are unloaded at the destination and taken delivery of by the Assessee from the railways and transported to the godowns of the Assessee or that of the consignment agents and entered in the relevant stock registers maintained in those places. The goods so kept in those godowns were also insured by the Assessee-company. The cement is sold to various buyers from the Branch or the consignment agents.

3. For the assessment year 1986-87 assessment under the Central Sales. Tax Act was completed on 20.10.1987. The Sales Tax Officer accepted the case of the Assessee that the transfer of cement made by the Assessee to its branch at Calcutta-and to its consignment agents outside the State of Orissa were transfer otherwise than by way of sale. But, the Assessee being aggrieved by some other aspects found against it filed an appeal before the Assistant Commissioner of Sales Tax. During pendency of the appeal, the Assistant Commissioner of Sales Tax issued a show cause notice dated 30.11.1988 to the Assessee, calling upon it to show-cause why the turn over determined should not be enhanced by treating the so-called stock transfers as inter-State sales. Yet Anr. notice dated 9.12.1988 was issued seeking verification of the books of accounts and other relevant documents maintained by the Assessee at its branch in Calcutta. Thereafter, the officers of the Sales Tax Department visited the Calcutta branch of the Assessee and examined the books of accounts, the records and other documents maintained by the Assessee. By order dated 16.2.1989. the Assistant

Commissioner of Sales Tax enhanced the turn over the Assessee by treating the so called stock transfers as inter-State sales. An Additional amount of tax was imposed on the Assessee. The Assessee challenged the decision of the Assistant Commissioner of Sales Tax before the Orissa Sales Tax Tribunal by way of a further appeal. That appeal was allowed by the Orissa Sales Tax Tribunal on 6.10.1990. The Tribunal set aside the order of the Assistant Commissioner of Sales Tax by reversing the finding that the branch transfers amounted to inter-State sales. The assessment proceeding was remanded to the Sales Tax Officer directing him to examine the issue in the light of the observations made by the Sales Tax Tribunal in its order. The Sales Tax Officer thereafter passed a fresh order of assessment on 31.3.1995. The Sales Tax Officer accepted the plea of the Assessee that the transactions were only stock transfers and were not inter-State sales. The assessing authority also ordered refund of certain amounts on the basis''of that decision. The Assessee thereupon made an application for refund. When the matter came to the notice of the assistant Commissioner of Sales Tax on the application for refund being forwarded to him by the Sales Tax Officer, the Assistant Commissioner of Sales Tax in exercise of his jurisdiction under Rule 80 of the Orissa Sales Tax Rules, issued a notice to the Assessee to show cause why the order of the assessing authority dated 31.3.1995 should not be revised. The Assessee raised objections inter alias submitting that the transactions were not inter-State sales. The Assistant Commissioner accepted the plea of the Assessee and passed the order dated 3.1.1996 accepting the case of the Assessee that the transactions were merely stock transfers and dropped the proceedings initiated under Rule 80 of the Rules. The claim for refund was upheld and the refund as ordered by the Sales Tax Officer was also made.

4. On 18.9.1996, the Assistant Commissioner of Sales Tax issued a notice u/s 16(1) of the Act seeking to verify the stock records and other documents of the Assessee relating to the stock transfers for the assessment year 1986-87. The Assessee replied to the notice and requested the Assistant Commissioner of Sales Tax to specify the records and the documents which were sought to be re-examined by him. There is no clarification in that regard by the Assistant Commissioner of Sales Tax. On 3.1.1998, a notice was received by the-Assessee from the Commissioner of Sales Tax. That was a notice under Rule 80 of the Orissa Sales Tax rules to suo motu enhance the turn over of the Assessee for the assessment year 1986-87 by treating the alleged stock transfers as inter-State Sales. As stated earlier, it is this notice that is challenged by the Petitioner-assessee in this writ petition.

5. Before proceeding further, we may refer to Rule 80 of the Orissa Sales

fax Rules, 1947. The said Rule read as follows:

80. Revision by the Commissioner Suo Motu-

The Commissioner may on his own motion at any time within three years from the date of passing of any order by the Sales Tax Officer or within two years from the date of passing of any order by Additional Commissioner or Assistant Commissioner, as the case may be call for records of the proceedings in which such order was passed and if he considers that any order passed therein is erroneous in so far as it is prejudicial to the interest of the Revenue he may after giving the dealer an opportunity of being heard and after making causing to be made such enquiry as he deems necessary revise any such order:

Provided that the Commissioner shall not revise any order under this rule:

(1) Where an appeal against the order is pending before the Appellant authority u/s 23,

(2) Where time-limit for filing an appeal u/s 23 has not expired.

On a plain reading of the Rule, it is clear that the Commissioner, on his on motion, within the time prescribed, can call for the records of the proceeding of any Additional Commissioner, Special Additional Commissioner or Assistant Commissioner and revise the same on finding that the order concerned was prejudicial to the interests of the revenue. But, the case of the Petitioner is that the Commissioner of Sales Tax by a notification dated 3.8.1963 had delegated his revisional power under Rule 80 of the Rules to the Assistant Commissioner of Sales Tax and since the Assistant Commissioner of Sales Tax had earlier issued a notice dated 13.12.1995 to the Assessee invoking Rule 80 of the Rules but thereafter had accepted the case of the Assessee and had dropped the proceeding initiated under Rule 80 of the Rules, it was not open to the Commissioner to seek to exercise the power under Rule 80 of the Rules all over again. It is submitted that the power under Rule 80 had already been exhausted by the delegate of the Commissioner, here the Assistant Commissioner of Sales Tax, and the power having, thus, been exhausted by being exercised by the delegate, the'' Commissioner was not entitled to again invoke the power under Rule 80 of the Rules.

It is submitted that when the Assistant Commissioner exercised the power as a delegate of the Commissioner, it must be taken that the Commissioner had himself exercised the power and in that situation, there was no question of the Commissioner exercising the power relating to the same assessment year, all over again.

6. This is sought to be met by the opposite parties by pointing out that the power under Rule 80 of the Rules is wide and the power is available to the Commissioner to revise any order of the Additional Commissioner. Special Additional Commissioner or the Assistant Commissioner, as the case may be, and since in this case the power was exercised earlier only by the Assistant Commissioner and had never been exercised by the Commissioner, the Commissioner was entitled to exercise that power to scrutinise the correctness of the order of assessment.

7. Before Rule 80 was amended with effect from 1.6.1976, the Rule as it then

stood came up for consideration before this Court in Hilari Store v. Commissioner of Sales Tax, Orissa and Anr. : (1996) 103 STC 26. This Court held that the power could not be exercised, where an appeal against an order was pending before the appellate authority, and the power could not be exercised when the Assistant Commissioner of Sales Tax in exercise of his appellate power, had confirmed the decision sought to be revised. The question also came up before the Supreme Court in State of Orissa and Ors. v. Krishna Store : (1997) 104 STC 594. In that case, the High Court had held that the Commissioner had jurisdiction to exercise power under Rule 80 of the Rules as there was an appellate order dismissing the appeal from the original order and that no reasonable opportunity of being heard was given to the Assessee. The Supreme Court, reversing the decision of the High Court, held that the Commissioner had jurisdiction to invoke his power of revision. In the context of Section 23(4) of the Act, the prohibition against revising an appellate order under Rule 80 of the Rules had to be taken as applying only to an appellate order in a full sense, i.e. an order passed after considering any issue arising in appeal. It was held that it did not cover an order of rejection of an appeal under Rule 49(1) of the Rules for failure to cure defects, when the appeal was not entertained at the threshold. Possibly in the context of this controversy, the rule was amended and the words "other than an appellate order" were deleted. The scope of the Rule came up for consideration before the Supreme Court in Commissioner of Sales Tax, Orissa and Anr. v. Hilari Store : (1997) 107 STC 579 in appeal from the decision of a Bench of this Court in (1996) 103 STC 26 referred to earlier. The Supreme Court after noticing the amendment of the Rule, held that there was no manner of doubt that u/s 23(4)(a) read with amended Rule 80 of the rules, the Commissioner had suo motu power to revise an appellate order as well. The view of this Court was not accepted and it was held that a plain reading of Section 23(4)(a) of the Act shows that the expression" any order made under the Act" was of wide connotation and it included an assessment order as well as an appellate order under the Act. The Supreme Court stated that the construction placed by it as above neither ran contrary to the scheme envisaged in Section 23 of the Act nor did it lead to any undesirable consequences. Thus, it was held that u/s 23(4)(a) of the Act the Commissioner on his own motion could revise any order, including an appellate order, made under the act or the Rules by a person other than the Tribunal or Additional Tribunal. The Supreme Court reversed the decision of the High Court and held that there was no curtailment of the suo motu revisional power of the Commissioner because of existence of the proviso to Clause (a) of Sub-section (4) of Section 23 of the Act. It was clarified that the limitation on the suo motu power of the Commissioner even to revise an appellate order was not in any manner bridled by anything contained in the Act.

8. In the case on hand, we are concerned with the amended Rule. Obviously in the light of the above decision, the learned Counsel did not raise an argument that since the order of assessment had been subjected to an appeal by the Assessee the power of revision could not be exercised by the Commissioner. He

confined his challenge based on the fact that tne Assistant Commissioner was a delegate of the Commissioner and had already exercised the power under Rule 80 of the Rules and in that context the Commissioner could not exercise the suo motu power under Rule 80 of the Rules to revise in effect the order of the Assistant Commissioner passed in a proceeding under Rule 80 of the Rules.

9. The essential argument on behalf of the Assessee is that the Assistant Commissioner exercised the power under Rule 80 of the Rules only in view of the delegation of power of the Commissioner to the Assistant Commissioner as provided by the Section 17 of the Act. The relevant notification dated 3.8.1963 is quoted by the Assessee in the writ petition. In that notification, the then Commissioner of Sales Tax with the prior approval of the State Government, delegated his powers and duties under the Act and the Rules framed thereunder as specified in the Schedule annexed to that notification, to Assistant Commissioner of Sales Tax. The power to revise suo motu assessment orders passed by the Sales Tax and the Assistant Sales Tax Officers, provided that no appeal had been filed against such orders, available under Sub-section 4(a) of Section 23 of the Act read with Rule 80 of the Orissa Sales Tax Rules., was also delegated. Of Course, in the light of the amendment to Rule 80 of the Rules '' and the decision of the Supreme Court referred to earlier, the limitation in exercise of power precluding such exercise in cases where an appeal had been filed, is no-more there. This delegation has necessarily to'' be understood in the context of the decision of the Supreme Court in Commissioner of Sales Tax, Orissa and Anr. v. Hilari Store : (1997) 107 STC 579.

10. We shall now refer to some of the relevant provisions to understand the scheme of the Act. Section 3 of the Act describes who is the taxing authority Section 3(1) gives power to the State Government to appoint any person to be the Commissioner of Sales Tax to exercise such powers and such functions as are imposed by or conferred under the provisions of the Act Section 3(3) gives power to the Government to appoint such other persons under any prescribed designation including an Additional Commissioner or a Deputy Commissioner to assist the Commissioner and they were entitled to exercise such powers and perform such duties as may be conferred or imposed by or under the provisions of the Act within such local area as may be assigned to them by-the Commissioner Section 3-A deals with powers and functions of the Commissioner. Clause (iii) of the said section enables the Commissioner to call for any record from any subordinate officer and also to call for any papers in connection with any assessment, and under Clause (iv) to inspect the records and to superintend the work of officers subordinate to him and their offices. Rule 3 of the Orissa Sales Tax Rules enumerates the Sales Tax Authorities. The said Rule provides that the authorities to be appointed for assisting the Commissioner shall be of the following designations. They are : Additional Commissioner of Sales Tax : Special Additional Commissioner of Sales Tax; Deputy Commissioner of Sales Tax; Assistant Commissioner of Sales Tax; Sales Tax Officer; Tax Recovery Officer; Assistant Sales Tax Officer; and Inspectors of Sales Tax. Thus, an

Assistant Commissioner of Sales Tax is appointed for assisting the Commissioner. To make matters clear. Rule 3(2) provides that the Assistant Commissioner of Sales Tax, the Sales Tax Officers and the Assistant Sales Tax Officers shall be subordinate to the Commissioner of Sales Tax. Rule 3(3) makes it clear that the Assistant Commissioner of Sales Tax shall be under the administrative control of the Commissioner of Sales Tax. Though by virtue of the delegation of power made the Assistant Commissioner of Sales Tax may be in a position to exercise the power under Rule 80 of the Rules, the Assistant Commissioner of Sales Tax doesnot cease to be an officer subordinate to the Commissioner of Sales Tax. Section 12 of the Act contemplates an assessment by the Commissioner. The assessment is taken up by the assessing officer by virtue of the delegation of that power made by the Commissioner. Section 23 of the Act provides that appeals and revisions would lie to the prescribed authority. Section 23(4)(a) provides that subject to such Rules as may be made and for reasons to be recorded in writing, the Commissioner may, upon application by a dealer or on his own motion, revise any order made under the Act or the Rules made the reunder by any person other than the Tribunal, appointed under Sub-section (3) of Section 3 to assist the Commissioner. Section 23(4)(c) provides for an appeal by any person aggrieved against the order passed by the Commissioner. Rule 79 of the Rules contemplates an application for revision to the Commissioner inter alia from an order of the Assistant Commissioner and Rule 80 provides for a suo motu revision by the Commissioner against an order passed by an Assistant Commissioner of Sales Tax, when the Commissioner considers an order to be prejudicial to the interest of the Revenue. Thus, under the scheme of the Act and the Rules, we have no hesitation in coming to the conclusion that there is no fetter on the Commissioner in exercising his suo motu power of revision, against an order passed by any of the authorities referred to thereunder, whatever may be jurisdiction that is invoked by that authority to pass the order sought to be revised.

11. The learned Counsel for the Assessee predictably placed reliance on the observations in the decision of this Court in Orient Paper Mitts v. State of Orissa and Ors. : (1988) 70 STC 333 wherein this Court held that the Commissioner could not in purported exercise of his power under Rule 80 of the rules revise an order passed by the Special Additional Commissioner, to whom the power had been delegated by the Commissioner. This Court stated that in the guise of framing rules, a substantive law giving a fresh quasi-judicial power of revision unconnected with procedure, could not be introduced or conferred. Rule 80 is a substantive quasi-judicial power given to the Commissioner to be exercised in general on his own motion to correct errors prejudicial to the interest of the Revenue. Rule 80 is an excessive delegation of substantive quasi-judicial power in favour of the Commissioner which -ex facie seems unsupportable. But, this Court did not strike down the Rule since it was exercising an appellate power under the Act and this Court observed that the validity of Rule 80 could be considered only in a proceeding under Article 226 of the Constitution of India.

But in the light of the two decisions of the Supreme Court referred to above, we may not be justified in placing reliance on the observations contained in the above judgment. The said observations must be taken to have been disapproved. Except relying on the abovo decision, the question of the constitutional walidity of the Rule as such was not debated before us by learned Counsel for the Assessee. What was stressed was that the delegate having exercised the identical power, the Commissioner could not again exercise that power.

12. We have dealt with in some detail, the scheme of the Act and the Rules. It appears to us that the authority of the Commissioner, under whom the other authorities are functioning, including the Assistant Commissioner, is no way conferred or restricted by anything contained in the act or the Rules. Whatever may be the power that is exercised by an authority subordinate to the Commissioner, to pass an order which the Commissioner considers to be prejudicial to the interest of the Revenue, that order could be revised by the Commissioner after following the procedure prescribed in that behalf. We do not think it necessary to further elaborate this aspect, since all that has happened here is that the Commissioner has Issued a notice to the Assessee invoking his power under Rule 80 of the Rules, and it remains for the Assessee to file its objections (if it has not already filed the same) and to put forward its contentions not only on the sustainability of the proceeding initiated by the Commissioner but also on the merits of the dispute that has arisen now. What we have dealt with here is only the argument that the Commissioner has no jurisdiction to initiate suo motu, a revision under Rule 80 of the Rules against an order of the Assistant Commissioner of Sales Tax passed in exercise of power under Rule 80 of the Rules. Since we have held that there is no fetter on the exercise of power by the Commissioner under Rule 80 of the rules read with Section 23(4)(a) of the Act, we have no hesitation in holding that there is no jurisdictional infirmity in the notice Annexure-8 issued to the Assessee in that view, we reject the challenge of the Assessee and dismiss this writ petition, but without prejudice to the right of Assessee to put forward all other contentions available to it under the Act, in answer to the notice issued by the'' Commissioner himself.